Supreme Court of the United States

OCTOBER TERM, 1940

No. 417

FUEL CREDIT CORPORATION, formerly DOBBINS TRINITY COAL COMPANY, INC.,
Petitioner,

against

THOMAS J. HOWARD, owner of the Barge "E. T. HALLORAN,"
Respondent,

and

Steam Tug "RUSSELL IV" and RUSSELL TOWING COMPANY,
Respondent-Impleaded.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOSEPH M. HOWARD,
Proctor for Respondent.

JOHN E. PURDY,
EDMUND F. LAMB,
Counsel for Respondent.

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This petition is for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit.

The petitioner, Fuel Credit Corporation (formerly Dobbins Trinity Coal Company, Inc.) seeks to review a decision of that Court which reversed a decision of Honorable GROVER M. MOSCOWITZ of the United States District Court for the Eastern District of New York, and ordered an interlocutory decree on mandate entered on behalf of Thomas J. Howard, as owner of the barge "E. T. Halloran", against the Fuel Credit Corporation for the damages sustained by the said barge while under charter to the petitioner.

POINT I.

The petitioner has totally ignored the issues presented to both the District Court and the Circuit Court of Appeals.

The petitioner attempts to treat this case as if it were one involving an ordinary towage contract and totally ignores the obligations arising *inter parties* because of the admitted charter. Where a vessel is admittedly delivered to a charterer in good condition and is returned damaged, it is the charterer's unquestioned burden to satisfy the Court that that damage has not resulted from any negligence either on the charterer's part or on the part of any one to whom it has entrusted the chartered vessel.

Swenson v. *Snare & Triest Co.*, 160 Fed. 459;
Terry & Tench Co., Inc. v. *Merritt & Chapman Derrick & Wrecking Co.*, 168 Fed. 533;
O'Brien Bros. Inc. v. *City of New York*, 9 F. (2) 542;
Tomkins Cove Stone Co. v. *Bleakley Transportation Co. Inc.*, 40 F. (2) 249;
Rover (*Currie* v. *Atlantic Lighterage Co.*), 1931 A. M. C. 355, affirmed (C. C. A. 2) 1931 A. M. C. 1097 (Not otherwise reported);
Ira S. Bushey & Sons, Inc. v. *W. E. Hedger & Co., Inc.*, 40 F. (2) 417;
O'Boyle v. *United States*, 47 F. (2) 585;
Cummings v. *Pennsylvania R. Co.*, 45 F. (2) 152;
Alpine Forwarding Co. v. *Pennsylvania R. Co.*, 60 F. (2) 734;
White et al. v. *Upper Hudson Stone Co., et al.*, 248 Fed. 893;

Schoonmaker Conners Co. Inc. v. *Lambert, Transp. Co., et al.*, 268 Fed. 102;
Gannon v. *Consolidated Ice Co.*, 91 F. 539 (C. C. A. 2);
Washington Tug & Barge Co. v. *Weyerhauser Timber Co.*, 22 F. (2d) 665 (C. C. A. 9);
The Moran No. 10, 41 F. (2d) 255 (S. D. N. Y.).

This fundamental issue is totally disregarded, although the accuracy of the relation is amply supported by the record. For example, at folio 62, this colloquy occurs:

> "The Court: You are suing the charterer.
> Mr. Lamb: Yes, a deposition has been taken of Captain—
> The Court: Is there any claim about your boat being unseaworthy?
> Mr. Lamb: I do not think so."

* * * * * * * *

and at folio 63:

> "The Court: Do you claim it is unseaworthy?
> Mr. McKernan: The physical condition of the barge?
> The Court: Yes, does anybody claim that?
> Mr. McKernan: No."

and at folio 64:

> "The Court: Do you claim any negligence on the part of Howard?
> Mr. McKernan: I do not claim Howard was negligent."

and at folio 72:

> "The Court: All right, *prima facie* they concede—
> Mr. Lamb: *Prima facie* they concede my case."

Under the facts therefore, an admittedly seaworthy barge has been damaged while under charter without the owner's negligence.

We respectfully refer the Court to an inspection of Dobbins' Exhibit 2, which consists of four photographs, which are to be found at folio 102 of the Record. These photographs are eloquent and incontrovertible proof of the damages sustained.

There could be no clearer case for the application of the presumption of negligence than the present one.

This Court is asked to issue a writ of certiorari because the Circuit Court of Appeals in a very well reasoned opinion decided that not only had the charterer failed to rebut the presumption arising by reason of the admitted relationship of the parties, but also found that there was proof that the "Russell #4", to whom the chartered vessel was admittedly entrusted, was negligent, which necessarily involved liability on the petitioner's part as charterer.

This Court on the petition for certiorari is therefore asked to totally disregard the holding of the Circuit Court of Appeals that the presumption of negligence has not been rebutted, and to consider only what petitioner claims is questionable proof of the negligence of the tug "Russell #4".

The sincerity of this argument can best be evaluated by reference to petitioner's answer, where petitioner in impleading Russell charged the Russell tug with liability for this damage, among other things, in failing to keep her tow under control, in causing and allowing the barge to strike an obstruction while in tow, and in bringing her tow into collision with the bottom (R., fols. 41-42).

The petitioner has thus charged in its pleading that the damage was caused through the very negligence of its agent, "Russell #4," which it is now attempting to dispute.

The difficulty with petitioner's position is just this: if the tug was not negligent, then the petitioner is still liable, for

the only explanation which the petitioner has attempted to offer, to wit, the negligence of the tug, being eliminated, petitioner is still faced with an unrebutted presumption of negligence. In *Tompkins Cove Stone Co.* v. *Bleakley Transportation Co.*, 40 Fed. (2) 249 (C. C. A. 3), the Court wrote at page 251:

> "If, however, the evidence which the charterer offered should not rebut the presumption * * * the presumption of negligence which the law lays against him in the beginning remains as though he had not made an attempt to rebut it, just as though he stood mute facing the presumption."

POINT II.

The statement of the Circuit Court of Appeals that evidence of an unexcused sheer is not sufficient to rebut the presumption of negligence by which the owner made his *prima facie* case against the charterer is not in conflict with its own decisions or the decisions of other circuits.

Judge SWAN, who wrote the opinion for the Circuit Court of Appeals for the Second Circuit, was unable to rationalize the contact shown by the photographs (Dobbins' Exhibit 2), and the verbal testimony that the vessel struck in close proximity with the rock-bound shore line in a position where the barge was never intended to be brought, as being anything but negligent navigation on the part of the tug.

The tug master definitely admitted that the tow sheered (R., fols. 119-120).

In the ordinary course of events, a barge, if properly towed, does not sheer.

The sheer itself is evidence of improper navigation. It was for this reason that Judge SWAN, at page 135, stated:

> "But really it is immaterial whether the object struck was a submerged rock or a submerged wreck. Whichever it was the contact and resulting damage occurred during an unexcused sheer which carried the barge close to the shore and into waters which the tug's master never intended her to enter."

The cases cited by the petitioner in an attempt to show that there is a conflict between the decision of the Circuit Court of Appeals for the Second Circuit in the instant case, and a decision of the Circuit Court of Appeals for the First Circuit, and earlier decisions in the Second Circuit, are not relevant to the physical situation present in the instant case. Here the barge, while under charter, was in tow with other vessels on short hawsers in the wide waters of the East River, New York Harbor (Opinion, R., p. 133, fol. 134). There were no unusual weather conditions and the barge was not steering, but was under the complete domination of the tug. The tug was employed by the charterer.

We have examined the cases cited by the petitioner and do not find them in any way relevant to the situation at bar. These cases all present peculiar factual situations not germane to the situation existing in the present case. None of the cases states any general principle of law in conflict with the decision of the Circuit Court of Appeals in the present case. In none of the cases was a chartered vessel involved, and the action was not against a charterer.

POINT III.

No grounds for certiorari have been shown by the petitioner.

The matter in issue is not of general or widespread importance, involving merely, as it does, a simple case of damage to a chartered barge. The decision of the Circuit Court

of Appeals proceeds upon well settled and long established charter law. No conflict with the charter law of other Circuits, or with any case decided by this Court, has been shown.

The writ prayed for should be denied.

Respectfully submitted,

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